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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-6595

DONALD LEE WILLIAMS,
Petitioner

v.

STATE OF NORTH CAROLINA,
Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA AND
THE COURT OF APPEALS OF NORTH CAROLINA

BRIEF OF RESPONDENT, THE STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

In an unpublished opinion filed November 16, 1977, and reported at 34 N.C. App. 502, 239 S.E. 2d 69 (1977), the North Carolina Court of Appeals affirmed the conviction of petitioner. A copy of the Court of Appeals' opinion was affixed to petitioner's Petition. The North Carolina Supreme Court dismissed petitioner's appeal from the judgment of the North Carolina Court of Appeals, reported at 294 N.C. 187, 241 S.E. 2d 73 (1978). That opinion was also attached to the Petition of petitioner Williams.

From the judgment below, Williams has filed this Petition for Writ of Certiorari to the North Carolina Supreme Court in the Supreme Court of the United States.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. WHETHER THE PROCEDURE FOR SENTENCING ON TRIAL DE NOVO WHERE THE JUDGE IS ON CONSTRUCTIVE NOTICE OF THE LOWER COURT'S SENTENCE AND IMPOSES A HARSHER SENTENCE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

2. WHETHER PRIOR UNCOUNSELLED MISDEMEANOR CONVICTIONS MAY CONSTITUTIONALLY BE USED TO ENHANCE SENCENCING UPON LATER CONVICTIONS?

3. WHETHER PRIOR UNCOUNSELLED MISDEMEANOR CONVICTIONS WHICH DO NOT RESULT IN INCARCERATION MAY BE USED TO IMPEACH DEFENDANT AT A LATER TRIAL?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

United States Constitution, Amendment XIV, Sec. 1:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

N.C.G.S. §7A-271(b) (1977 Supp.):

"Appeals by the . . . defendant from the district court are to the superior court. The jurisdiction of the superior court over misdemeanors appealed from the district court to the superior court for trial de novo is the same as the district court had in the first instance."

N.C.G.S. §20-138(a) (1975):

"It is unlawful and punishable as provided in G.S. 20-179 for any person who is under the influence of intoxicating liquor to drive or operate any vehicle upon any highway or any public vehicular area within the State."

N.C.G.S. §20-179(a) (1975):

"Every person who is convicted of violating G.S. 20-138 . . . shall be punished as follows:

(1) For the first offense, a fine of not less than one hundred dollars ($100.00) nor more than five hundred ($500.00) dollars, by imprisonment for not less than 30 days nor more than six months, or by both such fine and imprisonment, in the discretion of the court.

(2) For a second conviction of any offense under G.S. 20-138, . . . by a fine of not less than two hundred dollars ($200.00) nor more than five hundred dollars ($500.00), by imprisonment for not less than two months nor more than six months, or by both such fine and imprisonment, in the discretion of the court.

(3) For a third or subsequent offense under G.S. 20-138, . . . by a fine of not less than five hundred dollars ($500.00), by imprisonment for not more than two years, or by both such fine and imprisonment, in the discretion of the court."

STATEMENT OF THE CASE

The petitioner was originally brought for trial in the Durham County, North Carolina District Court under a warrant which charged him with operating a motor vehicle while under the influence of intoxicating liquor (third offense), and with operating a motor vehicle without being licensed. The petitioner entered pleas of guilty to both offenses, judgments were entered accordingly, and the petitioner was sentenced to serve a term of six months in prison. The petitioner thereafter exercised his right to appeal to the Durham County Superior Court for trials de novo on the charges. All of the files maintained on the District Court proceedings, including the fact of the convictions and the terms of the petitioner's sentence, were forwarded to the Superior Court prior to the petitioner's trial in that Court.

Following the appeal from District Court, and after trial by jury, the petitioner was convicted in Superior Court of the crime of operating a motor vehicle while under the influence of intoxicating liquor, in violation of N.C.G.S. §20-138. He was acquitted on the charge of operating a motor vehicle without being licensed. The petitioner was punished as one who had suffered his third conviction under the driving under the influence statute, as allowed by N.C.G.S. §20-179(a)(3). The Superior Court judge sentenced the petitioner to serve a one-year term of imprisonment, although the District Court had imposed only a six months sentence where the petitioner had been convicted of two offenses, in contrast to the sole conviction which was returned in the Superior Court.

The petitioner was convicted in Superior Court, and sentenced as a third time offender of the driving under the influence statute, on February 15, 1977. The punishment statute authorized the imposition of a maximum six months term of imprisonment for those convicted under the driving under the influence statute on fewer than three occasions, N.C.G.S. §§20-179(a)(1), (2), and allows for a sentence of up to two years upon third and subsequent convictions. N.C.G.S. §20-179(a)(3). The two prior convictions for driving under the influence were obtained against the petitioner on June 17, 1966 and on December 10, 1974. As to each of those convictions the Superior Court judges specifically found, as of record, that: "There is no indication in the record that the [Petitioner] had counsel, or that he, by any affirmative act, waived counsel . . . . and the Court assumes for the purpose

of this ruling that he was indigent at that time." (Record on appeal to North Carolina Court of Appeals at p. 19). Following each of the prior convictions the petitioner was fined $100.00 and ordered to pay the costs of Court. He did not receive a jail sentence, either active or suspended, following either of the prior uncounselled convictions. The Superior Court judge ruled that the 1966 and the 1974 driving under the influence convictions could lawfully be considered to support the petitioner's conviction and sentencing as a third time offender of the statute. Although the petitioner received no jail sentence following either of his two previous convictions, the one-year jail sentence which the petitioner was ordered to serve following his 1977 conviction as a third time offender could not have been imposed but for the existence of the two prior uncounselled driving under the influence convictions on his criminal record.

The Superior Court judge further ruled that, in the event the petitioner took the witness stand to testify on his own behalf at his trial, the District Attorney would be allowed to inquire of the 1966 and 1974 uncounselled driving under the influence convictions, for impeachment purposes. Following that ruling the petitioner did not take the witness stand to offer his own testimony at the trial.

The petitioner began service of his one-year prison sentence pursuant to his conviction as a third time offender of the statute proscribing the operation of a motor vehicle while under the influence of intoxicating liquor on February 20, 1978.

ARGUMENT

1. THE PROCEDURE FOR SENTENCING ON TRIAL DE NOVO WHERE THE JUDGE IS ON CONSTRUCTIVE NOTICE OF THE LOWER COURT'S SENTENCE AND IMPOSES A HARSHER SENTENCE DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioner urges this Court to grant a Writ of Certiorari to review the procedure for sentencing on trials de novo in North Carolina where he alleges the Court is on at least constructive notice of the lower court's sentence prior to imposing a harsher sentence. The thrust of his argument is that the threat of vindictiveness requires that the reasons for a more severe sentence than that received in the first instance affirmatively appear in the record under the decisions in North Carolina v. Pearce, 395 U.S. 711 (1969) and its progeny, including Colten v. Kentucky, 407 U.S. 104 (1972); Chaffin v. Stynchcombe, 412 U.S. 17 (1973); Blackledge v. Perry, 417 U.S. 21 (1974); and Ludwig v. Massachusetts, 427 U.S. 618 (1976). Respondent urges that under the facts in this instance, petitioner's argument be rejected.

In Colten v. Kentucky, 407 U.S. 104 (1972), this Court recognized the two-tier system for adjudicating less serious criminal cases in Kentucky as being similar to that under consideration in this instance. Colten v. Kentucky, supra, at Footnote 4. In that instance, as we have here, the trial de novo court was aware of the sentence imposed by the Court of the first instance. Colten v. Kentucky, supra, at Footnote14. The Supreme Court was aware of this fact when it acted in the Colten case but did not find that per se such was inconsistent with its previous holdings.

In Chaffin v. Stynchombe, 412 U.S. 17 (1973), this Court acknowledged the possible imposition of a harsher sentence in the two-tier system but noted the absence of vindictiveness in the two-tier system. The Court said:

> "The question in that case was whether the Pearce principle applied to bar the imposition of a higher sentence after a de novo trial in those jurisdictions that employ a two-tier system of trial courts. While noting that '[i]t may often be that the [de novo "appeal" court] will impose a punishment more severe than that received from the inferior court', id. at 117, we were shown nothing to persuade us that 'the hazard of being penalized for seeking a new trial, which underlay the holding of Pearce, also inheres in the de novo trial arrangement." Id. at 116 (emphasis added). In short, the Due Process Clause was not violated because the 'possibility of vindictiveness' was not found to inhere in the two-tier system. Ibid." Chaffin, at 26.

Under Chaffin, it was noted that the jury was not aware of the accused's prior convictions or sentences. But even in cases where the Court has been aware, the absence of vindictiveness has been the determinant issue. (See Colten v. Kentucky, supra; Ludwig v. Massachsetts, 427 U.S. 618 [1975]).

In this instance, the petitioner received a six month sentence upon conviction for two offenses in the District Court. Upon appeal de novo, he received a one year sentence upon conviction for a single offense. Petitioner alleges that the Court was on notice of the District Court sentence at the

time of sentencing and therefore, could not have received a harsher sentence without the reasons affirmatively appearing.

In discussing the logic, and in upholding the right of the Superior Court on trial de novo to impose a harsher sentence after being convicted in an inferior court without requiring that reasons for the harsher sentence be given by the trial court, the Supreme Court of the United States stated:

> "We see no reason, and none is offered, to assume that the de novo court will deal any more strictly with those who insist on a trial in the superior court after conviction in the Quarterly Court than it would with those defendants whose cases are filed originally in the superior court and who choose to put the State to its proof in a trial subject to constitutional guarantees.
>
> It may often be that the superior court will impose a punishment more severe than that received from the inferior court. But it no more follows that such a sentence is a vindictive penalty for seeking a superior court trial than that the inferior court imposed a lenient penalty. The trial de novo represents a completely fresh determination of guilt or innocence." Colten, supra, at 117.

Although petitioner received a greater sentence in this instance for one offense than he did initially for two offenses, there is no showing of vindictiveness on the part of the trial court as a desire to punish petitioner for exercising his right to a trial by jury. The fact that the Court had constructive notice of petitioner's prior sentence does not alter the facts in this instance.

Petitioner was convicted on a single count of driving under the influence, third offense. The sentence of one year was within the maximum allowed under G.S. §20-179. The Court having heard the testimony and observed defendant throughout trial was in a position to fit the punishment to the crime. In his discretion and within the limits allowed by the statutes of North Carolina, the trial judge met his responsibility. That decision should not be questioned absent a showing of vindictiveness which Petitioner has not shown. For the reasons hereinabove stated, the petitioner's Writ of Certiorari should be denied.

II. THE PRIOR UNCOUNSELLED MISDEMEANOR CONVICTIONS MAY BE USED TO ENHANCE SENTENCES UPON LATER CONVICTIONS.

Petitioner, in this instance, was convicted of operating a motor vehicle while under the influence of intoxicating liquor for the third offense. Under G. S. 20-179, conviction for the third offense is punishable by a fine of not less than five hundred dollars, by imprisonment for not more than two years, or both in the discretion of the judge. Imprisonment and/or fine is less if conviction is for the first or second offense of the same charge. Thus, the two prior convictions enhance the punishment for a third offense of the same nature.

Petitioner argues that in allowing for the imposition of a one-year sentence in this instance, which could not have been imposed but for the existence of the two prior uncounselled misdemeanor convictions, the State of North Carolina is in conflict with Argersinger v. Hamlin, 407 U.S. 25 (1972); Burgett v. Texas, 389 U.S. 109 (1967) and with the Sixth and Fourteenth Amendments to the United States Constitution. We believe petitioner's view to be in error.

Argersinger holds that a person may not be imprisoned for an offense unless, absent a waiver, he was represented by counsel at his trial. In the prior uncounselled misdemeanor convictions in this instance, petitioner was not imprisoned in either instance. Argersinger requires legal counsel only if incarceration results from conviction. The petitioner here is not entitled to the benefit of the Argersinger v. Hamlin holding to escape incarceration in this instance where he was represented by counsel.

Burgett v. Texas, supra, fails to aid petitioner in this instance, also. Burgett held that conviction, obtained in violation of Gideon v. Wainwright, 372 U.S. 335 (1963) could not be used to support the imposition of an enhanced punishment.

In Gideon v. Wainwright, supra, petitioner, indigent, requested that the State of Florida provide him with appointed counsel for a felony charge which the Court denied. The United States Supreme Court held that indigent defendants charged with felonies were entitled to court appointed counsel.

The Burgett ruling expanded that holding, but it too was concerned only with the use of felonies to enhance punishment. Thus, the holding in Burgett, "to permit a conviction obtained in violation of Gideon v. Wainwright to be used against a person either to support guilt or enhance punishment for another offense" is not applicable in this instance. It applies to felonies, not misdemeanors.

In this instance, the prior uncounselled misdemeanor convictions did not result in incarceration. Thus, court appointed counsel was not required. Petitioner, under the circumstances of the prior misdemeanor court appearances, was not entitled to counsel, his convictions were valid constitutionally and could be used to enhance future punishment.

For the reasons stated, this Court should not issue a Writ of Certiorari in this matter.

III. PRIOR UNCOUNSELLED MISDEMEANOR CONVICTIONS WHICH DO NOT RESULT IN INCARCERATION MAY BE USED TO IMPEACH DEFENDANT AT A LATER TRIAL.

In this instance, the trial court ruled that if the petitioner had taken the witness stand to testify he was subject to impeachment by use of the prior uncounselled convictions. Relying upon Potts v. Estelle, 529 F.2d 450 (5th Cir. 1976), cert. den., 434 U.S. 1001 (1977), petitioner argues that the prior uncounselled convictions could not be used to impeach a defendant's testimony at a later criminal trial when the prior misdemeanor conviction exposed the defendant to the possibility of incarceration although no incarceration occurs. Respondent urges that this view be rejected.

In Loper v. Beto, supra, the United States Supreme Court ruled that the use of "convictions constitutionally invalid under Gideon v. Wainwright to impeach a defendant's creditability deprives him of due process". Loper at 483.

In Loper, defendant questioned the use by the prosecutor for impeachment purposes, of four prior uncounselled felony convictions. Since Gideon v. Wainwright is concerned with felonies, and likewise Loper, it is the respondent's view that the holding of those cases, coupled with Argersinger and Berry v. Cincinnati, 414 U.S. 29, 94 S.Ct. 193, 38 L.Ed. 2d 187 (1973), limit its rulings to felony convictions.

Respondent takes the view which the Fifth Circuit reached in Cottle v. Wainwright, 477 F.2d 269 (1973), that Argersinger applied in misdemeanor convictions only where defendant suffered incarceration. Although Cottle was overturned by Potts, supra, the rationale of Cottle is applicable here. The Court said there:

> "The Court in Argersinger made it clear that 'no person may be imprisoned . . . unless he was represented by counsel.' 407 U.S. at 37, 92 S.Ct. at 2012 (Emphasis added). Thus, the court concluded, 'The run of misdemeanors will not be affected by today's ruling. But in those that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of the guiding hand of counsel" so necessary when one's liberty is in jeopardy.' at 40, 92 S.Ct. at 2014. (Emphasis added). Inasmuch as Cottle, for all that appears, was not deprived of his liberty when he was convicted the first time of public drunkenness, the conviction is not tainted by reason of the fact that he was not afforded counsel to represent him. However, as to his second conviction, which did in fact result in imprisonment, Cottle was constitutionally entitled to counsel, and, none having been provided, that conviction is invalid and may not be considered by the Parol Commission in any future proceeding to revoke Cottle's parole."

In the case at bar, petitioner did not suffer incarceration. Since Argersinger made it clear that it was concerned with imprisonment without counsel and Loper, supra, is concerned only with a felony, neither is applicable in this instance.

Potts v. Estelle, upon which petitioner chiefly relies, overruled the Fifth Circuit's earlier decision under Cottle and expanded the holding of Argersinger. Potts recognized that the Supreme Court in Argersinger, did not address the question of "Gideon's application to the situation where the maximum possible sentence for a particular offense is imprisonment, but the sentence actually imposed is only a fine or a term of imprisonment that is suspended." Potts v. Estelle, supra at 453. In answering that issue, the Fifth Circuit went beyond Argersinger, respondent believes unnecessarily.

Where Argersinger made it clear that "no person may be imprisoned . . . unless he was represented by counsel", Argersinger, supra at 37; Potts holds that the necessity for counsel in "prior misdemeanor prosecutions is to be judged by the maximum possible sentence. . . ", Potts, supra at 454. Such expansion of the rule in Argersinger is not needed nor desired. Respondent urges that this view be rejected and that the petitioner's request for Writ of Certiorari be denied.

CONCLUSION

For the reasons stated above, the Respondent submits that there is no error in the decisions of the North Carolina Court of Appeals, and the Supreme Court of North Carolina, and that the Petition for Writ of Certiorari should be denied.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing and attached Brief of Respondent, The State of North Carolina, in Opposition to Petition for Writ of Certiorari, was served upon the Petitioner, through his counsel of record, by depositing same in the United States mail, first class, postage prepaid, and addressed as follows:

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This the 28th day of June, 1978.

RUFUS L. EDMISTEN
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